IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1686

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Respondents.

BRIEF OF INTERVENORS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Intervenors District No. 1-Pacific Coast District, Marine Engineers Beneficial Association, AFL-CIO and District 2 Marine Engineers Beneficial Association-Associated Maritime Officers, AFL-CIO (hereinafter referred to collectively as MEBA), submit this Brief in opposition to the Petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

I. Introduction

This matter is before the Court on a Petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals enforced the Order of the National Labor Relations Board finding that Inter-

national Organization of Masters, Mates and Pilots (hereinafter referred to as MMP) violated Section 8(b)(1)(B) of the National Labor Relations Act (hereinafter referred to as the Act), 29 USC 158(b)(1)(B). MMP has filed the instant Petition for a writ of certiorari.

Two Courts of Appeals have considered the exact issue involved here and have reached the same results. In *International Organization of Masters, Mates and Pilots (Marine and Marketing Corporation)*, 197 NLRB No. 69 (1972), enforced, *International Organization of Masters, Mates and Pilots* v. *NLRB*, 486 F.2d 1271 (D.C. Cir. 1973), *cert. den.* 416 U.S. 956 (1974), the Court of Appeals for the District of Columbia Circuit enforced a Board Order finding MMP to have violated Section 8(b)(1)(B) by the same conduct as gives rise to the instant proceeding. And in the instant case, the Court of Appeals for the Fifth Circuit followed the Court of Appeals for the District of Columbia Circuit and similarly found the same conduct to be a violation of the Act by MMP.

The Petition for a writ of certiorari in the instant case raises no new or unusual issue. The National Labor Relations Board and the Courts of Appeals have uniformly found that MMP's picketing of vessels to obtain the replacement of existing deck officers, to secure recognition of MMP and a collective bargaining agreement or to require compliance by an employer with MMP's alleged labor standards is in violation of Section 8(b)(1)(B) of the Act. This Petition does not raise any question of differing statutory interpretations or of important national significance. The decision of the Court of Appeals was correct. Intervenors, therefore, submit that the Petition for a writ of

certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

II. Statement of the Case

MMP's picketing of two newly constructed vessels gives rise to the instant case. The first such vessel, the M/V Ultramar, is owned by CIT Corporation and bareboat chartered to Aries Marine Shipping Company. Aries entered into a crew husbanding agreement for the vessel with Westchester Marine Shipping Company under which Westchester supplies the crews and other provisions for the vessel. Westchester is a party to a collective bargaining agreement with Intervenor District No. 1-Pacific Coast District, MEBA, AFL-CIO which represents all supervisory licensed marine officers aboard the vessel.

In November, 1973, members of MMP picketed the M/V Ultramar in Destrehan, Louisiana with picket signs stating that its deck officers were employed under lower standards than those enjoyed by members of MMP. The picketing was preceded by a number of requests and demands by MMP to the owners and operators of the vessel for placing of MMP members as licensed deck officers aboard the vessel, for recognition of MMP and for a collective bargaining agreement.

The second vessel is the M/V Sugar Islander. This ship is owned by Bankers Trust Company and time chartered to California and Hawaiian Sugar Company. A bareboat charter on the vessel is held by Pyramid Sugar Transport, Inc. which crews and operates the vessel. Pyramid is a party to a collective bargaining agreement with District 2 Marine Engineers Beneficial Association-Associated

Maritime Officers, AFL-CIO which represents the licensed marine officers aboard the vessel.

In September, 1973, and January 1974, MMP picketed the M/V Sugar Islander at New Orleans and Reserve, Louisiana. The first picket sign stated that the M/V Sugar Islander was "unfair" to MMP and the second referred to the deck officers aboard the vessel working under lower standards than deck officers represented by MMP. The vessel was also picketed on two other occasions.

It is undisputed that the licensed deck officers aboard these vessels are supervisors within the meaning of the National Labor Relations Act. They are empowered by the owners or operators of each vessel to adjust the grievances of the unlicensed seamen who are represented by the Seafarers International Union (SIU). SIU's collective bargaining agreements with Westchester and Pyramid provide for the processing of the grievances of unlicensed personnel by the licensed deck officers aboard the vessel and the licensed deck officers are authorized and empowered to resolve such grievances.

Westchester, Pyramid and California and Hawaiian Sugar Company each filed unfair labor practice charges against MMP with the National Labor Relations Board alleging a violation of Section 8(b)(1)(B) of the Act. A consolidated complaint was issued and hearings were held before an Administrative Law Judge. He found that the object of the picketing was to force these employers to replace their MEBA represented supervisory licensed deck officers with members of MMP and held that picketing for such purpose fell within the proscription of Section 8(b)(1)(B) of the Act (Petition, pages 30a-75a). The National

Labor Relations Board affirmed the Administrative Law Judge's holding and further found that MMP's action in seeking recognition as the collective bargaining representative of the licensed deck officers, in seeking a collective bargaining agreement covering licensed deck officers and in seeking application of its contract standards to the licensed deck officers abroad the vessels was also in violation of Section 8(b)(1)(B) of the Act.*

The Court of Appeals for the Fifth Circuit affirmed the Board's finding of a Section 8(b)(1)(B) violation by MMP. Like the Board, it held that it was a violation of Section 8(b)(1)(B) for MMP to picket these ships for the object of (1) replacing MEBA deck officers with MMP deck officers, (2) forcing these employers to recognize MMP as the collective bargaining representative of the licensed deck officers, (3) forcing these employers to enter into a collective bargaining agreement with MMP, or (4) forcing these employers to apply so-called MMP labor standards to these vessels. The Court of Appeals relied upon the decision of the Court of Appeals for the District of Columbia Circuit in *International Organization of Masters, Mates and Pilots* v. *NLRB*, 486 F.2d 1271 (D.C. Cir. 1973), *cert. den.*, 416 U.S. 956 (1974). This Petition followed.

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* In its Petition to this Court, MMP makes frequent reference to the so-called substandard manning of a Master and three mates contained in the MEBA collective bargaining agreements covering these vessels. MMP neglects to mention that this complement of licensed deck officers has been approved by the United States Coast Guard for these vessels and that the Maritime Administration of the U.S. Department of Commerce has granted subsidy for the operation of these vessels only upon the basis of such a complement of a Master and three mates (Petition, pages 42a, 43a, fn. 11).

III. Reasons Why the Writ Should Not Be Granted

Intervenors submit that the decision of the National Labor Relations Board and its enforcement by the Court of Appeals were correct. No important question of statutory interpretation is presented by this Petition.

This Court has repeatedly emphasized the Board's expertise in applying the provisions of the National Labor Relations Act to the complexities of industrial life. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). This Court has recently affirmed the Board's "responsibility to adapt the Act to changing patterns of industrial life." *NLRB* v. *Weingarten*, 420 U.S. 251, 266 (1975).

Section 8(b)(1)(B) of the Act, 29 U.S.C. 157(b)(1)(B), provides that it is an unfair labor practice for a labor organization to restrain or coerce an employer

> in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

MMP's activities fall squarely within the confines of this statutory proscription. The purpose of MMP's picketing was to pressure Westchester and Pyramid to violate their contract with MEBA, to discharge the Master and licensed deck officers aboard the vessels and to employ MMP's members as licensed deck officers under a collective bargaining agreement with MMP.

The statute makes it an unfair labor practice for a labor organization to restrain or coerce an employer "in the selection of his representatives for the purpose of . . . the adjustment of grievances." The licensed deck officers aboard these vessels are representatives of the employer for purposes of the adjustment of grievances. They resolve the problems and grievances of non-supervisory unlicensed personnel and are authorized to do so by their employer. MMP's entire course of conduct, as to these vessels, was directed towards coercing Westchester and Pyramid in the selection of their licensed deck officers who are their representatives for purposes of adjusting grievances.

MMP argues at length in its Petition that Section 8(b)(1)(B) of the Act was never intended to prohibit a union which represents supervisors from engaging in picketing or other activities to protect or promote the interests of its supervisory membership. It points to the adverse effect upon MMP and to unrelated excerpts from the legislative history. The difficulty with its entire argument, aside from its previous rejection by the Board and the Court of Appeals for the District of Columbia, is that MMP's conduct squarely runs afoul of the express and specific provisions of the statute. Section 8(b)(1)(B) makes it an unfair labor practice for a labor organization to restrain or coerce an employer in the selection of his representatives who adjust grievances. MMP has clearly sought to restrain and coerce Westchester and Pyramid in their selection of licensed deck officers, who are the representatives of these employers engaged in the adjustment of grievances.

The Board considered and rejected MMP's argument. It said:

"We also find no merit in Respondent's argument that Section 8(b)(1)(B) was not intended to prohibit a union, which represents supervisors, from engaging in picketing solely to protect and improve the wages, hours, and working conditions of its members, and in particular to prevent the erosion of labor standards which Respondent has established over years of collective bargaining, and that Congress did not intend to prohibit picketing for the kinds of objectives which Respondent was pursuing here; i.e., recognition and/or a collective bargaining agreement. In other words, Respondent argues that Section 8(b)(1)(B) was designed only to prohibit a union from seeking to interfere with the employer's literal 'selection' of his 8(b)(1)(B) representatives. This argument is contrary to both the facts and the law."

The Court of Appeals for the Fifth Circuit adopted the Board's analysis. Judge Ainsworth, speaking for the Court, said:

"Implicit in section 8(b)(1)(B) is the congressional judgment, which surfaces explicity in another section of the Act, see 29 U.S.C. §164(a), that relations between an employer and its supervisory personnel should be insulated in full measure from coercive efforts by a labor union. Thus, a union violates section 8(b)(1)(B) if it strikes to force an employer to hire only union members as foremen, See *International Typographical Union Local 28* v. *NLRB,* 278 F.2d 6 (1 Cir. 1960), aff'd by an equally divided Court, 365 U.S. 705, 81 S.Ct. 855, 6 L.Ed. 2d 36 (1961), and the employer may demand with impunity that supervisory personnel neither retain their union membership not

participate in any way in union affairs. See *Beasley* v. *Food Fair of North Carolina,* 416 U.S. 653, 661-662, 94 S.Ct. 2023, 40 L.Ed. 2d 443 (1974). A crucial feature of the employer's prerogative to demand the complete loyalty of its supervisory personnel is the concomitant right to designate as its representatives for the adjustment of grievances those persons whom it pleases. Indeed, the employer's section 8(b)(1)(B) decision can be based, permissibly, on reasons completely divorced from the grievance adjusting abilities of the different contenders for supervisory positions. The employers in the instant case, Westchester and Pyramid, were free to designate MEBA as the representative for licensed deck officers on the Ultramar and the Sugar Islander in the belief that the MEBA contract, with its reduced manning requirement and other features, was more economical that the standard MMP contract and reflected an understanding by the MEBA hierarchy of the precarious competitive position of the United States Merchant Marine. Notwithstanding the difficulties involved in a post hoc reconstruction of the employer's reasons for selecting a particular representative, see *Marine & Markting, supra* at 1275, section 8(b)(1)(B) secures to the employer the unfettered right to select supervisory personnel, and its grounds for selection are not subject to challenge in defense of a charged violation of that provision." (Petition, pages 10a-11a)

The express statutory language of Section 8(b)(1)(B) shows that Congress has proscribed exactly the kind of conduct that took place in this case. The specific wording of the statutory prohibition condemns the coercion of an

employer, by picketing or otherwise, in the selection of his grievance adjusting supervisors. The picketing of Westchester and Pyramid to require these concerns to employ MMP members as supervisory grievance adjusters is expressly proscribed by Section 8(b)(1)(B).

MMP's attempted reference to legislative history does not provide any basis for this Court's consideration of this matter. As the Court of Appeals for the District of Columbia said in *Marine and Marketing, supra,* it may well be that Congress did not address itself to the specific problem involved here since it assumed that supervisors would only be part of an organization composed exclusively of supervisors and not part of a "labor organization" within the meaning of the Act. 486 F.2d at page 1274. But Congress did not create the exception to Section 8(b)(1)(B) which MMP asked the Board and the Court below to create. There is no basis for this Court to review these entirely proper determinations.*

But MMP's Petition contends that this Court's decision in *Forida Power & Light Co.* v. *International Brotherhood of Electrical Workers,* 417 U.S. 790 (1974) changes the basis for the statutory interpretation of the Board and the courts which have considered this problem. MMP states that review by this Court is necessary to clarify the scope and meaning of Section 8(b)(1)(B) as interpreted and applied in *Florida Power.* We submit that such a contention is without merit.

In *Florida Power,* a union had disciplined supervisors for crossing its picket line and performing bargaining unit

* The Board also found MMP to have violated Section 8(b)(1)(B) of the Act by similar conduct in *International Organization of Masters, Mates and Pilots (Cove Tankers, Inc.),* 224 NLRB No. 206 (1976).

work. The Board found a violation of Section 8(b)(1)(B). The Court of Appeals for the District of Columbia reversed and this Court affirmed the reversal of the Board's finding of a violation of the Act.

This Court traced the decisional history of the interpretation of Section 8(b)(1)(B). It referred to the Board's prior finding of a violation of that section in the attempt by a union to influence the manner in which a supervisor performed his supervisory functions. But the Court rejected the Board's attempt to extend that doctrine to forbid the discipline of supervisors for the performance of bargaining unit work during a strike.

This Court referred to Section 8(b)(1)(B) as follows:

> Both the language and the legislative history of §8(b)(1)(B) reflect a clearly focussed congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances. By its terms, the statute proscribes only union restraint or coercion of an employer 'in the selection of his representatives for purposes of collective bargaining or the adjustment of grievances,' and the legislative history makes clear that in enacting the provision Congress was exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment. 417 US at page 803.

The Court's holding in *Florida Power* is succinctly set forth as follows:

> Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the selection of its representatives for the purposes of collective bargaining and grievance adjustment. The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of §8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing that duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer. 417 US at pages 804, 805.

The issue in the instant case is completely different from that present in *Florida Power*. Here, MMP restrained and coerced Westchester and Pyramid in their selection of their licensed deck officers who are their representatives for purposes of grievance adjustment. MMP's activity was directed at requiring these employers to discharge their licensed deck officers and substitute members of MMP for them. Its picketing was aimed at causing these employers to select different representatives for purposes of grievance adjustment. Such conduct is squarely proscribed by Section 8(b)(1)(B) of the Act. *Florida Power* has no effect upon the issues involved here. That case concerned a completely different problem—the discipline of a supervisor for crossing a picket line and performing bargaining unit work. It has no applicability to the instant case.*

* Interestingly, MMP sees a conflict between the principle established in the instant case and *Florida Power* even though the Court of Appeals for the District of Columbia Circuit which decided *Florida Power* and *Marine and Marketing* saw no such conflict. In *Marine and Marketing*, Judge Wright and Judge Mackinnon formed the majority. In *Florida Power* Judge Wright wrote the majority opinion for the Court of Appeals and Judge Mackinnon dissented. Obviously, Judge Wright, who was in the majority in both *Marine and Marketing* and *Florida Power* saw no inconsistency between the holdings in these two cases and Judge Mackinnon's dissent in *Florida Power* was on completely different and unrelated grounds.

The Court of Appeals for the Fifth Circuit saw no inconsistency between its decision in the instant case and *Florida Power*. Speaking for the Court, Judge Ainsworth said that the Court did not read *Florida Power* "as impugning either the reasoning of the D.C. Circuit in *Marine & Marketing* or the result that we reach here." (Petition, page 11a). The Court pointed out that not only were there factual differences between the instant case and *Florida Power*, but also

> the union coercion in the instant case was directed at the employers, Westchester and Pyramid, themselves; the disciplinary proceedings in *Florida Power & Light* amounted to indirect coercion of the employer at best. When the union coercion called into question is applied directly to the employer, the Board is correct in enforcing the statute to its literal limit, which clearly encompasses picketing for replacement purposes. (Petition, page 12a)

Subsequent to *Florida Power*, the Board has found that a union violated Section 8(b)(1)(B) by striking to secure the reappointment of an assistant foreman who was an employer representative for purposes of adjusting grievances. It held that this section proscribed "the right to dictate to an employer the selection of a particular supervisor." *Laborers International Union of North America, Local 478*, 204 NLRB No. 32 (1973), enforced, *Laborers Lo-*

cal 478 v. *NLRB*, 503 F.2d 192 (D.C. Cir. 1974). See also *Sheet Metal Workers International Association, Local Union No. 17 (George Koch Sons Inc.)*, 197 NLRB 166 (1972), enforced *NLRB* v. *Sheet Metal Workers International Association*, 502 F.2d 1159 (1st Cir. 1973), *cert den.* 416 US 904 (1974).

IV. Conclusion

This case does not raise any serious statutory or policy question requiring review by this Court. The National Labor Relations Board has consistently interpreted the statute so as to proscribe conduct of the type engaged in by MMP here and its interpretation has been upheld by the courts. There is no conflict among the Courts of Appeals and this Court's Decision in *Florida Power* raises no question as to the validity of these prior holdings. The Petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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